80-776

No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HAZIE NICHOLS SHORT,
Petitioner,

versus

BRAXTON L. KITTRELL, JR.,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For The Fifth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Rule 37 of the *Federal Rules of Civil Procedure* should be construed and applied to allow the dismissal of a plaintiff's action for failure to attend an oral deposition in the absence of continual violations of discovery rules or orders.

2. Whether Rule 37 of the *Federal Rules of Civil Procedure* should be construed to allow dismissal of a plaintiff's action for failure to attend an oral deposition when the notice for the taking of the deposition stated that the deposition was to be taken "pursuant to the Alabama Rules of Civil Procedure."

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PETITION FOR CERTIORARI

The petitioner, Hazie Nichols Short, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 22, 1980.

OPINIONS BELOW

The unreported opinion of the Court of Appeals appears in the Appendix attached hereto. No opinion was rendered by the District Court for the Southern District of Alabama.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 22, 1980. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 *U.S.C.* §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, 28 U.S.C. §1254

> "Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"
>
> * * *

Fed. R. Civ. P. 37(b)(2) and (d)

> (b) *Failure to Comply with Order.*
>
> (1) *Sanctions by Court in District Where Deposition is Taken.* If deponent fails to be sworn or to

answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part there-

of, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of the subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. . . .

(d) *Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on

behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories, submitted under Rule 33, after proper service of the interrogatories or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

STATEMENT OF THE CASE

This action stemmed from a contest over the ownership of real and personal property that Petitioner,

Hazie Nichols Short, received from Robert Short in California. The transfer of this property was pursuant to a consummated gift and a power of attorney executed in California.

An action was brought in the Circuit Court of Mobile County, Alabama, to contest Petitioner's ownership of this property. The circuit court determined that the gift and power of attorney were invalid under Alabama Law. This finding was reached despite the fact that the gift and power of attorney were both executed in California.

Based on this finding, the circuit court ordered Petitioner removed as administratrix of the estate of Robert Short and ordered her to return all the property she had received from Robert Short. (R. 6-10.) When she failed to comply with this order, the circuit court issued a Writ of Attachment on her property and issued an order for her arrest.

Petitioner then brought an action for declaratory judgment in the United States District Court for the Southern District of Alabama seeking to declare the decree of the Circuit Court of Mobile County, Alabama, unconstitutional and null and void. (R. 1.) Petitioner also sought a temporary restraining order and preliminary injunction to restrain the execution of a Writ of Attachment against Petitioner's property to prohibit the arrest of Petitioner pursuant to the decree of the Mobile County Circuit Court. (R. 11, 12.) The district

court originally issued a Temporary Restraining Order restraining the Respondent from executing a Writ of Arrest. (R. 19, 20.) However, this Temporary Restraining Order was dissolved two days later. (R. 27-28.)

The Respondent, Braxton Kittrell, delivered a notice of deposition "pursuant to the Alabama Rules of Civil Procedure." (R. 44.) Petitioner failed to attend, and the Respondent filed a Motion to Dismiss for Failure to Attend Oral Deposition. (R. 48, 49.) This motion was granted and the district court dismissed Petitioner's action. (R. 50.) Petitioner's motions to set aside the court's Order of Dismissal were denied. (R. 54, 57.) Petitioner filed Notice of Appeal based on the district court's dismissal of Petitioner's action and the denial of Petitioner's motion to set aside the Order of Dismissal. (R. 58.)

The Court of Appeals for the Fifth Circuit affirmed the decisions of the district court.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Previous Decisions Of This Court And Violates The Due Process Clause Of The Fifth Amendment To The Constitution.

In previous decisions, this Court has held that a trial court's power to order sanctions under *Fed. R. Civ. P.* 37

is not unlimited and is restricted by the due process clause of the fifth amendment. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); *Societe Internationale v. Rogers*, 357 U.S. 197 (1958). This restriction was violated in the instant case, since the dismissal of Petitioner's action under the circumstances of the case constituted mere punishment. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909); *Hovey v. Elliott*, 167 U.S. 409 (1897).

The decisions by this court in *Societe Internationale v. Rogers, supra*, and *National Hockey League v. Metropolitan Hockey Club, Inc., supra*, indicate that the extreme sanction of dismissal should be imposed only when there has been flagrant bad faith or a callous disregard of responsibility. None of these elements were present in the present case. Mrs. Short merely failed to appear for the taking of a deposition. There had not been repeated failures to comply with discovery orders or procedures or any other indication of a lack of cooperation by Mrs. Short. Under these circumstances, the imposition of the draconian sanction of dismissal was unwarranted and in conflict with the guideline established by this Court in *Societe Internationale v. Rogers, supra*, and *National Hockey League v. Metropolitan Hockey Club, Inc., supra*.

This is particularly true in light of the fact that Mrs. Short would have been subject to arrest by the Sheriff of Mobile County if she had appeared for the taking of her deposition. As this Court recognized in *Societe Inter-*

nationale v. Rogers, supra, "[i]t is hardly debateable that fear of criminal prosecution constitutes a weighty excuse for non-production." 357 U.S. at 211. Likewise in the present case, Mrs. Short's avoidance of the Respondent's attempts to have her arrested was a valid excuse for failing to appear for the taking of her deposition.

Mrs. Short's failure to appear at the deposition is also excused by the fact that she was not given proper notice of the taking of the deposition. The notice stated that Mrs. Short was to appear for "oral examination pursuant to the Alabama Rules of Civil Procedure." Since the action had been brought in the Federal District Court for the Southern District of Alabama, all discovery was governed by the *Federal Rules of Civil Procedure.* Thus, Mrs. Short did not receive the "proper notice" required by *Fed. R. Civ. P.* 37(d), and the imposition of sanctions for her failure to appear was improper.

Due to the fact that Mrs. Short had valid justification for failing to appear at the taking of her deposition and that there were no other violations of discovery orders or procedures, dismissal was an unwarranted and unjustified sanction. Dismissal under these circumstances constitutes prohibited punishment, for the court went far beyond the necessities of the situation. 4A Moore's Federal Practice ¶ 37.03 [2.-1] (2d ed. 1980).

Accordingly, since the decision of the Court of Appeals conflicts with the decisions of this Court in *Societe Internationale v. Rogers, supra; Hammond Packing Co. v. Arkansas, supra;* this Court should grant the petition for certiorari to review the decisions of the lower courts.

2. The Decision Below Raises Important Questions As To The Proper Application Of The Federal Rules Of Civil Procedure.

Since the *Federal Rules of Civil Procedure* are prescribed by this Court pursuant to 28 *U.S.C.* §2072, this Court has an important interest in assuring that the Rules are interpreted and applied properly. This fact has been recognized as a factor in granting certiorari in *Societe Internationale v. Rogers, supra,* and in *Schlagenhauf v. Holder,* 379 U.S. 104 (1964). In addition to being in conflict with previous decisions of this Court, the decision below raises important questions concerning the application of Rule 37 that should be resolved by this Court.

The decision by the Court of Appeals for the Fifth Circuit which affirmed dismissal of Petitioner's action raises serious questions as to the circumstances under which the ultimate sanction of dismissal can be imposed. Rules 37(b)(2) and (d) provide that the court may impose such sanctions "as are just" on a party who fails to appear for the taking of a deposition. The determination of whether a particular sanction is "just" re-

quires a balancing of the circumstances with the sanction.

However, in the case at bar, the district court did not attempt to employ a sanction to suit the infraction by the Petitioner. Rather, the court imposed the sanction of dismissal which was not justified by the circumstances of the case, and, therefore, the sanction imposed by the district court must be deemed not just.

If the decision of the district court as affirmed by the Court of Appeals is allowed to stand it will establish a precedent authorizing all district courts to utilize the sanction of dismissal for all violations of the Rules of Procedure. Thus, the requirement that the district court may only impose sanctions which are "just" would become a nullity.

Accordingly, this Court should grant the petition of certiorari to review the decisions of the lower courts in order to provide the proper construction of the requirement that the sanction must be just and to establish guidelines for the imposition of the severe sanction of dismissal. Otherwise, the district courts will be permitted to utilize sanctions that are not "just" under the circumstances and to impose the sanction of dismissal even though such a sanction is not warranted.

This Court should also review the actions of the lower courts to provide proper construction of the requirement of "proper notice" of the deposition re-

quired by Rule 37(d). Since the validity of a discovery sanction depends upon the validity of the underlying discovery order, *International Union v. National Right to Work*, 590 F.2d 1139 (D.C. Cir. 1978); 4A Moore's Federal Practice, *supra*, ¶ 37.03 [2.-3] at 37-60, the imposition of a sanction for a failure to attend a deposition would not be valid unless proper notice was given.

In the case at bar, the notice stated that the deposition was to be taken "pursuant to the Alabama Rules of Civil Procedure." This was not proper notice since the taking of the deposition would be governed by the *Federal Rules of Civil Procedure*. Accordingly, the district court did not have the power under Rule 37(d) to impose sanctions based on Petitioner's failure to attend the deposition.

For the reasons stated above, the decisions of the courts below raised serious questions concerning the construction and enforcement of Rule 37 which should be resolved by this Court. Accordingly, the Court should grant the petition for certiorari to review these decisions and to establish the proper interpretation of Rule 37.

3. The Decision Of The Court Below Threatens This Court's Goal Of Uniformity Of Procedure In Federal Courts.

In *Hanna v. Plumer*, 380 U.S. 460 (1965), this Court granted certiorari because the decision of the Court of Appeals interpreting *Fed. R. Civ. P.* 4(d) constituted a

threat to the Court's goal of uniformity of federal procedure. Likewise, in the case at bar, the decision of the lower court will lead to a breach in the uniformity of federal procedure.

The decision of the lower court allowed the imposition of sanctions even though the notice stated that it was to be an "oral examination pursuant to the Alabama Rules of Civil Procedure." This decision will allow district courts to impose sanctions based upon a violation of state rules of procedure and authorizes the taking of depositions pursuant to state rules of procedure.

Since the rules of procedure vary from state to state, this will lead to conflicts between the circuits, and the rules of procedure in federal district courts will be dependent upon the state in which the court is located. This will constitute a clear violation of the goal of uniformity of federal procedure for which the *Federal Rules of Civil Procedure* were enacted.

CONCLUSION

The decision of the court below raises important questions concerning the application and construction of the *Federal Rules of Civil Procedure*. The decision below also conflicts with previous decisions by this Court and constitutes a breach of the Court's goal of uniformity of federal procedure.

For these reasons, a writ of certiorari should be issued to review the judgment and decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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Telephone (205) 269-2361
Attorney of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been mailed, postage prepaid, addressed to Hon. Charles A. Graddick, Attorney General of Alabama, 250 Administrative Building, State of Alabama, Montgomery, Alabama 36130, this ____ day of November, 1980.

I further certify that all parties required to be served have been served.

CHARLES S. CONLEY

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1509

HAZIE NICHOLS SHORT,
Plaintiff-Appellant,

versus

BRAXTON L. KITTRELL,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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AUGUST 22, 1980

Before VANCE and GARZA, Circuit Judges, and ALL-GOOD*, District Judge.

PER CURIAM:

AFFIRMED. See Local Rule 21.[1]

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1 *See NLRB v. Amalgamated Clothing Workers of America*, 430 F.2d 960 (5th Cir. 1970).

* District Judge of the Northern District of Alabama, sitting by designation.